IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 878 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

STATE OF GUJARAT

Versus

RAMESH MAVJI THAKKAR

Appearance:
MR RM CHAUHAN, ld.APP for the appellant
NOTICE SERVED for Respondent

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 18/06/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

The appellant-State of Gujarat, has challenged the judgment and order dated 28th March 1984 rendered in Sessions Case No.33 of 1984, by the learned Sessions Judge, Rajkot, acquitting the respondent of the offences punishable under Sec.302 of IPC and Sec.37(1) and 135 of the Bombay Police Act.

2. The case of the prosecution, briefly summarised is, as under:

Deceased Rameshkumar Dwarkadas Ganatra used to reside in a deli situated in Ranchhodnagar Society locality within the city of Rajkot and that his brothers, Prabhudas, Mansukhlal and Hematlal also used to occupy certain portions of the said premises, i.e. deli. Deceased Rameshkumar had contracted a second marriage with Jyoti Jyotiana at the relevant time and was staying in a portion of the deli with his second wife. Mansukhlal, the other brother of the deceased also used to reside in a portion of the deli with his wife Ranjanben, who was having five brothers including the present respondent Rameshkumar Thakkar. It appears that there was a dispute before two or three days of the actual incident between Jyotiben and Ranjanben regarding filling of water in the tank in the deli and therefore, the deceased had probably scolded Ranjanben, wife of Mansukhlal and the sister of the present respondent. It is the prosecution case that Ranjanben had not only filed a complaint against the deceased Rameshkumar and another brother Hematlal, but had also informed her brothers. On 11.7.1983, deceased Rameshkumar had gone to the deli for a cup of tea and while he was returning at 4.00 p.m., the respondent who was present in the portion of the premisses occupied by his sister Ranjanben, and her husband Mansukhlal, came out to the deli and had given two successive knife blows to the deceased. This incident is alleged to have been witnessed by two eye witnesses, namely, Jyotiben, wife of the deceased and Minaben, daughter of Prabhudas, The deceased was removed to the Government Hospital, Rajkot in injured condition in an autorickshaw where the formal FIR was recorded. It is the case of the prosecution that the deceased had given out the dying declaration and on the registration of the FIR by Jyotiben, the offences punishable under Sec.326 of IPC and Sec.37(1) and 135 of the Bombay Police Act were registered against the respondent. During the course of treatment, on 13.7.1983, the deceased died and therefore, the offence punishable under Sec.302 of IPC was also registered.

After completion of the necessary investigation,

the respondent was chargtesheeted before the learned Magistrate, who later on, committed the case to the Sessions Court, Rajkot, as the offence was exclusively triable by the Sessions Court.

The charge at Exh.2 for the offence under Sec.302 of IPC and Sec.37(1) and 135 of the Bombay Police Act was framed against the respondent who pleaded not guilty to the same and claimed to be tried. The learned trial Judge, after appreciating the evidence, recorded the further statement of the respondent and came to the conclusion that the prosecution has failed to prove the charge levelled against the respondent and therefore, acquitted the respondent by the impugned judgment. Hence, the present appeal by the State.

3. Mr.Chauhan, learned APP after taking us through the entire evidence on record, has broadly submitted that the learned trial Judge has committed an error by rejecting the oral testimony of two eye witnesses, namely, Jyotiben, PW6 at Exh.25 and Minaben, PW7 at Exh.26 together with the oral dying declaration at Exh. 24 made before the Executive Magistrate Mr.Harshadray M.Vyas and the complaint at Exh.44 before the PSI, Mr.B.K.Gameti, respectively. In the submission of the learned APP, the incident had taken place in broad day light and especially when the respondent was known to the eye witnesses, there was no reason for the PWs to falsely involve the respondent in commission of the offence.

4. No doubt, Jyotiben at Exh.25 and Minaben at Exh.26, in their evidence have clearly involved the respondent in commission of the offence. In their evidence, they have stated that on 11.7.1983, when the deceased was going out of the house to cross the Fali at 4.00 p.m., the respondent had come out of the house portion occupied by Ranjanben and was intercepted. It is further deposed by them that the respondent inquired from the deceased as to why he was harassing Ranjanben and the deceased tried to pacify the respondent by saying that everything was over and that now he should not interfere in the household quarrel. However, the respondent was enraged and took out a knife and inflicted two successive blows to the deceased. It is further deposed by them that one blow was given to the deceased beneath the left axilla while the second blow was given on the back portion and after giving the blows, the respondent fled. It is further stated by these PWs that the deceased was removed to the hospital at about 3.45 p.m. According to Jyotiben, Exh.25, she had waited in the hospital upto 6.45 p.m. However, in between 6.45 p.m. and 7.00 p.m.,

she had gone to her house to collect certain clothes and necessary articles and had waited at the house at least for 1-1/2 hours and during this period, PSI had gone to the house and she had shown him the actual spot of occurrence.

She, in her evidence, has clearly stated that when she had come back to her house from the hospital with a view to collect certain clothes and other necessary articles, she had not seen any blood anywhere in the deli. She has also stated that the deceased was removed to the hospital in injured condition in an autorickshaw by herself and the other witnesses Jethabhai and Vrajlal and their garments were not soiled by blood of the deceased. She has further deposed that the deceased had fallen down just near the edge of Osri. She does not know as to whether there was any blood in the fali and also regarding the existence of blood in the autorickshaw. It is her further say that somebody had given the old Chadar or the Gabhas so that the same can be applied to the injuries on the person of the deceased.

According to the evidence of Minaben, Exh.26, after giving the two blows, the respondent had run away and that the exact spot of incident was near the tank situated in the deli. Her further say is that the deceased was profusely bleeding, she had given the bed sheet and certain other rags or Gabhas to Jyotiben who had applied the same to the injuries. Minaben has further stated that her uncle, the deceased, had not fallen down in the fali but they had taken him to the osri. According to her, no blood on the osri or on the edge of the osri is found. According to her, there was some blood at a distance of 4 ft. from the wall of the tank. She has further stated that the deceased was bleeding profusely even when he was made to sit in the osri. Minaben has further stated in her evidence that Ranjanben, her sister is also an eye witness.

5. From the evidence of the aforesaid two witnesses, it is clear that the deceased was assaulted in the fali and later on, he was taken to the osri and even though the deceased was profusely bleeding, no blood stains were found either in the fali or in the osri, which is clear from the Panchnama of scene of offence. The prosecution, therefore, with a view to explain this position, has examined Amita, sister of Minaben at Exh.27. According to her, she had returned from the school at about 5.45 p.m. and at that time, she had heard that the respondent had assaulted deceased Rameshbhai and the deceased was taken to the hospital in an injured condition. According

to her, she had gone to the inner portion of the house occupied by them and after having a change over, she had come out in the osri and at that time, she had seen that there was some blood in the fali, but her further say is that she had also noticed that some child had excreted in the fali and that she wanted to wash off and to clear off the excretion and at that time along with the excretion, she had also washed off the blood which was lying in the fali.

6. After having carefully examined the aforesaid evidence, it clearly emerges that there was no blood in the fali and that even if the explanation regarding the absence of blood in the fali as tendered by Amita at Exh.27 is to be accepted, then also, though it is the case of the prosecution that the deceased was made to sit in the osri and that he had profuse bleeding, there was no blood stains or even a dot of blood in the osri. It is never the case of the prosecution that osri was also washed off by Amita or some helpful witnesses. Moreover, the say of Jyotiben is that the Gabhas were supplied to her by somebody. She does not give out the name of Minaben which ordinarily was not possible. Minaben had tried to polish the case of the prosecution by saying that she had supplied Gabhas, but she was made to admit that she had not given out the said version in her police statement. Moreover, the Gabhas had not been recovered by the police. The panchnama at Exh.30 is clearly ante-timed. The entry at Exh.42 does not speak anything regarding the place of occurrence. It is, therefore, clear that the aforesaid evidence makes the case of the prosecution regarding the spot of occurrence extremely doubtful. Consequently, the oral testimony of the two alleged eye witnesses, namely, Jyotiben and Minaben becomes equally dubious.

From the arrest panchnama, at Exh.38, it appears that when the respondent was arrested, he was having two injuries - one was the edioma on the ankle joint and the other one was the wheal mark on the back portion. The panchnama at Exh.38 is proved by the panch witness Ravjibhai Parmar at Exh.37 in which it is clearly stated that the above said injuries were there on the person of the accused. However, the eye witnesses Jyotiben and Minaben have given no explanation whatsoever regarding the above said two injuries and on the contrary, their say is that they have not seen the injuries and therefore, they have nothing to say in this respect.

7. From the above circumstances, in our opinion, the prosecution case appears to be doubtful.

8. The prosecution has placed reliance upon two dying declarations at Exh.24 recorded by the Executive Magistrate Mr.Harshadray Vyas and Exh.44 recorded by PSI Mr.Gameti. We have gone through the contents of both the dying declarations as well as the evidence of the Executive Magistrate Mr.Harshadray Vyas and PSI Mr.Gameti. After minutely examining the same, we are clearly of the opinion that none of the above two dying declarations inspire confidence about their genuineness. In the dying declaration at Exh.24, a pointed question was put to the deceased regarding the assailant and his say was that he was assaulted by brothers of his Bhabhi. A subsequent question was put to him regarding the name of the brother of the Bhabhi and the deceased has replied that he does not know the name of the brother of his Bhabhi. From this dying declaration at Exh.24 recorded at 8.45 p.m. it becomes clear that the deceased was not knowing the name of the assailant. However, it is the case of the prosecution that the deceased used to know the accused by face and by name. It is the case of prosecution that at least two witnesses namely, Jyotiben and Minaben had seen Rameshbhai Thakkar (respondent), running away after inflicting the injuries on the person of the deceased. If this was the situation, then the deceased must have been able to give out the name of the assailant as Rameshbhai Thakkar at least at about 8.40 p.m. on that fateful day. It is pertinent to note that the complaint at Exh.44 has been recorded in the form of alleged FIR by the investigating agency at about 5.15 p.m. on 11.7.1983 wherein the deceased had given out the name of Rameshbhai Thakkar (respondent) as the assailant, and the deceased had in terms stated in the said FIR that the respondent had come out of the house portion occupied by Mansukhlal and later on he was assaulted and the respondent gave two knife blows to him. If the deceased had given out the name of the assailant in the FIR at Exh.44 recorded at 5.15 p.m., he would not have missed to give out the name of the very person in the dying declaration at Exh.24 recorded in between 8.30 p.m. and 8.40 p.m. on the same day before the Executive Magistrate, Mr.Harshadray Vyas. This position remains unexplained and incompatible and this discrepancy, in our opinion, is sufficient to raise a doubt regarding the genuineness of the dying declaration at Exh.24 recorded by the Executive Magistrate.

9. The learned trial Judge, after appreciating the evidence on record, found the following proposition in para 97 of the judgment:

(a) That Jyotiben, the wife of the deceased does not correctly describe the situs of the injuries.

(b) That Jyotiben and Minaben do not raise any cry for help even though they see the entire evidence taking place allegedly in the Deli surrounded by residential houses and a factory.

(c) That no blood was found on the Osri though it is the case of the prosecution that the deceased was made to sit there and he was bleeding profusely.

(d) That the explanation tendered by the prosecution for the absence of blood, on Osri, by saying that 'Gabhas' were applied to the injuries can be accepted as Jyotiben shows ignorance regarding the person giving her the 'Gabhas' while Minaben who, says that she had supplied the same to Jyotiben had admittedly maintained complete silence in her police statement in respect of 'Gabhas'.

(e) That no blood stained 'Chadar' or 'Gabhas' have been attached.

(f) That the explanation tendered by the prosecution regarding the absence of blood in Fali appears to be doubtful.

(g) That the panchnama of Scene of Occurrence cannot be accepted to have been drawn in presence of Jyotiben and it, beyond any manner of doubt, contains false timings.

(h) That the alleged F.I.R. is clearly ante-timed and is said to be recorded at such a time when the deceased was not able to speak.

(i) That the deceased states in the alleged Dying Declaration Exh.24 recorded by the Executive Magistrate between 8.40 to 8.55 p.m. that he does not know the name of the assailant who was one of the brothers of Ranjanben though it is the case of the prosecution that the deceased used to know the accused both by name and face.

(j) That though it is the case of the prosecution that both Jyotiben and Mina knew the accused both by face and name, no such information is supplied to Vrajlal who is the first outsider to enter the deli and to the subsequent comer Chatur alias

Chakabhai, the Autorickshaw Driver.

(k) That the absence of the name of the assailant in Dying Declaration Exh.24 goes to show that the name of the assailant who was known to Jyotiben and Minaben by name and face was not disclosed as assailant till 8.45 p.m.

(l) That the police station diary Exh.42 based upon the information supplied by P.C.Ikbal Karim is conspicuously silent regarding the place of occurrence and the name of the assailant.

(m) That the alleged Dying Declaration in form of the F.I.R. which is ante-timed shows the name of the accused while in the Dying Declaration Exh.24 allegedly recorded by the Executive Magistrate at 8.40 the deceased clearly states that he does not know the name of the assailant.

(n) That though the deceased was having the blood group 'O+' the muddamal knife is said to have been stained with human blood of 'B' group.

(o) That the injuries on the person of the accused have not been explained.

(p) That the ante-timings in alleged F.I.R. and certain panchnamas show that investigation is not fair.

Suffice it to say, we are in total agreement with the said conclusion reached by the learned trial Judge. Needless to say that the learned APP has failed to assail the said conclusions. Under the circumstances, we are clearly of the opinion that the learned trial Judge has not committed any error in passing the order acquitting the respondent for the offence for which he was charged. We, therefore, see no reasons to interfere with the judgment and order passed by the learned trial Judge. Accordingly, we see no merits in this appeal. The appeal is accordingly dismissed.

(Kshitij R. Vyas, J.)

(Kamal M. Mehta, J.)

Sreeram.